

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN CARTER, an individual, et al.,

Plaintiffs,

V.

WYNN LAS VEGAS, a Nevada Limited
Liability Company, et al.,

Defendants.

Case No. 2:10-cv-01868-KJD-GWF

ORDER

Presently before the Court is Defendant Waits, LLC's Motion to Dismiss (#34). Plaintiffs filed a response in opposition (#37) to which Defendant Wait's LLC replied (#40).

I. Background

Plaintiffs and other class members (“Employees”) are current or former employees of Wynn Las Vegas (“Wynn”) at its nightclubs, commonly referred to as Tryst and XS. Wynn’s terms of employment are laid out in the Collective bargaining Agreement (“CBA”), which was signed by Wynn and the Local Joint Executive Board of Las Vegas Culinary Union Local 226 and Bartenders Union Local 165 (“Labor Organizations”). The current gratuity policy at Wynn is to pool gratuities (“tips”) and distribute them on a pro-rata basis based upon hours worked (“Tip Distribution Policy”). Plaintiffs have filed the present suit against Wynn and Waits, LLC, among others, alleging that the Tip Distribution Policy distributes tips to management personnel who are precluded from sharing in

1 tips pursuant to the CBA. Waits, LLC is a Nevada limited liability company and the Amended
 2 Complaint (#8), does not specify anything else about the business. Plaintiffs' causes of action are: (I)
 3 Breach of Contract; (ii) Breach of Covenant of Good Faith; (iii) Conversion; (iv) Unjust Enrichment;
 4 (v) Declaratory relief; (vi) Accounting; and (vii) Injunctive Relief. Waits, LLC has filed a motion to
 5 dismiss for failure to state a claim because, it argues, it is an improper party to the suit.

6 **II. Motion to Dismiss**

7 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a plaintiff's complaint for "failure
 8 to state a claim upon which relief can be granted." A properly pled complaint must provide "a short
 9 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
 10 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require
 11 detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation
 12 of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan
 13 v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the
 14 speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint
 15 must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal,
 16 129 S. Ct. at 1949 (internal citation omitted).

17 In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply when
 18 considering motions to dismiss. First, the Court must accept as true all well-pled factual allegations
 19 in the complaint; however, legal conclusions are not entitled to the assumption of truth. Id. at 1950.
 20 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not
 21 suffice. Id. at 1949. Second, the Court must consider whether the factual allegations in the
 22 complaint allege a plausible claim for relief. Id. at 1950. A claim is facially plausible when the
 23 plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the
 24 defendant is liable for the alleged misconduct. Id. at 1949. Where the complaint does not permit the
 25 court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not
 26 shown—that the pleader is entitled to relief." Id. (internal quotation marks omitted). When the

1 claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint
 2 must be dismissed. Twombly, 550 U.S. at 570.

3 **A. Breach of Contract - Claim (i)**

4 Plaintiffs' Amended Complaint ("Complaint") (#8) alleges that Defendants are liable for
 5 breach of contract because the Tip Pooling Policy violated the CBA. Defendant Waits, LLC argues
 6 that it is an improper party to the breach of contract claim because it is not a signatory to the CBA.
 7 Plaintiffs contend that the "absence of a contractual relationship" does not preclude Plaintiffs from
 8 proving facts in support of its claims against Waits, LLC. (#37).

9 Claims for breach of a collective bargaining agreement give rise to federal question
 10 jurisdiction under Section 301 of the Labor Management Relations Act. Rose v. Beverly Health &
 11 Rehabilitation Services, Inc., 295 Fed.Appx. 142, 144 (9th Cir. 2008), citing 29 U.S.C. § 185(a). A
 12 non-signatory to a collective bargaining agreement is a proper party under §301 if "the suit [is] based
 13 on an alleged breach of contract between an employer and a labor organization and [the] resolution
 14 of the lawsuit [is] focused upon and governed by the terms of the contract." Milne Employees Ass'n
 15 v. Sun Carriers, 960 F.2d 1401, 1407 (9th Cir. 1991), citing Painting & Decorating Contractors Ass'n
 16 v. Painters & Decorators Joint Comm., 707 F.2d 1067 (9th Cir. 1983), *cert. denied*. However, the
 17 non-signatory must be a third party beneficiary of the agreement and the claim must be well pled.
 18 Milne Employees Ass'n, 960 F.2d at 1406-7, citing Karo v. San Diego Symphony Orchestra Ass'n,
 19 762 F.2d 819 (9th Cir. 1985).

20 Here, the CBA is between Wynn and the Labor Organizations and the resolution of this law
 21 suit is focused on the terms of the CBA. Therefore, Waits, LLC could be a proper party to the breach
 22 of contract claim and the fact that it is a non-signatory to the CBA is irrelevant. However, Plaintiffs
 23 have not pled facts which indicate Waits, LLC is a third party beneficiary to the CBA nor any other
 24 facts that state Waits, LLC's relevance to the CBA whatsoever. The only mention of Waits, LLC in
 25 the Complaint is under the list of Defendants where it is listed simply as a Nevada limited liability
 26 company. (#1). To address this deficiency, Plaintiffs argue that because Cy Waits ("Cy") and Jesse

1 Waits (“Jesse”) are the sole managing members of Waits, LLC and they are or were managing
 2 partners of Tryst and XS, the Complaint implicitly alleges Waits, LLC is involved in the
 3 management of the nightclubs.¹ (#37). The Court disagrees. Cy and Jesse have been sued in their
 4 individual capacities and their management of Waits, LLC is not sufficient to assume a connection
 5 between the entity Waits, LLC and the management of Tryst and XS. Plaintiffs have neither pled
 6 what kind of business Waits, LLC conducts nor how they believe it was involved in the management
 7 of Tryst or XS. The Court, therefore, cannot draw a reasonable inference that Waits, LLC is liable
 8 for the alleged misconduct. However, Plaintiffs are granted leave to amend because even though
 9 Plaintiffs have failed to correctly state allegations against Waits, LLC, the Court finds that there may
 10 be facts which can be proven under amendment to the pleadings that will constitute a sufficient
 11 claim. See Miller v. Rykoff-Sexton Inc., 845 F.2d 209, 214 (9th Cir. 1988). Accordingly, the
 12 Breach of Contract claim against Wait, LLC is dismissed with leave to amend.

13 **B. Breach of Covenant of Good Faith- Claim (ii)**

14 All of Plaintiffs’ allegations concerning the breach of covenant of good faith claim are against
 15 Wynn. Plaintiffs make no allegation against Waits, LLC or any other Defendant other than Wynn.
 16 Therefore, Plaintiffs have failed to state a claim upon which relief can be granted. Further, based on
 17 the allegations in the complaint and Plaintiffs failure to acknowledge the pleading deficiency in their
 18 response in opposition, it appears that any amendment to this claim would be futile. Accordingly,
 19 this claim against Waits, LLC is dismissed with prejudice.

20 **C. Conversion - Claim (iii)**

21 Plaintiffs assert that Defendants, through the Tip Distribution Policy, forced Employees to
 22 give a portion of the tips left to them by customers to management personnel. The Complaint further
 23 states, “Plaintiffs allege Defendants wrongfully exerted dominion and control over Employees’
 24 personal property.” (#8). Waits, LLC argues that not only have Plaintiffs not pled that it was

25
 26 ¹Managing personnel could be considered third party beneficiaries because they allegedly were
 improperly given a portion of the tips under the Tip Distribution Policy.

1 management personnel, but it in fact was not management personnel. (#34). Therefore, Waits, LLC
2 argues, Plaintiffs have not pled whether or how Waits, LLC exercised dominion and control over the
3 tips. The Court agrees.

4 As discussed above, Plaintiffs have not provided any indication that Waits, LLC is or was
5 involved in the management of Tryst or XS. Therefore, stating that management personnel received
6 tips does not implicate Waits, LLC. Further, the statement that “Plaintiffs allege Defendants
7 wrongfully exerted dominion and control over Employees’ personal property,” is merely a recitation
8 of the elements of conversion. Nevertheless, for the same reasons as with the breach of conflict
9 claim, the Court does not find that an amendment would be futile. Accordingly, the conversion
10 claim against Waits, LLC is dismissed with leave to amend.

11 **D. Unjust Enrichment - Claim (iv)**

12 Plaintiffs alleged that Defendants unjustly retained the property of Employees by refusing to
13 return the tips rightfully belonging to Employees when the Defendants had no right to such tips.
14 Waits, LLC argues that Plaintiffs’ allegations are legal conclusions without facts and merely
15 formulaic recitation of the elements.

16 Without factual allegations of how Waits, LLC was involved in managing Tryst and XS,
17 Plaintiffs’ unjust enrichment claims against Waits, LLC are based on legal conclusions. Plaintiffs’
18 contention that it needs discovery to determine the exact relationship between Waits, LLC and Wynn
19 is not a credible explanation for the deficiency. Plaintiffs must have a reason to believe and must
20 explain to the Court why adding Waits, LLC as a party was appropriate. Accordingly, the unjust
21 enrichment claim against Waits, LLC is dismissed with leave to amend.

22 **E. Declaratory Relief - Claim (v)**

23 No declaratory relief for violation of the CBA by Waits, LLC can be granted without
24 knowing Waits, LLC’s involvement in management. Accordingly, the declaratory relief claim
25 against Waits, LLC is dismissed with leave to amend.

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1 **F. Accounting - Claim (vi)**

2 Plaintiffs assert that under the Fair Labor Standards Act, all Defendants are “employers” and
 3 therefore have a duty to keep books and records of the amount of tips and gratuities due and owed to
 4 Employees. Waits, LLC argues that Plaintiffs have provided no facts that indicate how Waits, LLC
 5 is an employer and further, that Plaintiffs should have pled facts to support guarantor liability or alter
 6 ego, which it did not and could not.

7 Under the Fair Labor Standards Act, 29 U.S.C. § 211, employers have a duty to make, keep
 8 and preserve records of the persons employed and of wages, hours, conditions, and practices of
 9 employment. FLSA § 203(d), defines an employer as “any person acting directly or indirectly in the
 10 interest of an employer in relation to an employee . . .”

11 Here, Plaintiffs have alleged no facts concerning how Waits, LLC acted directly or indirectly
 12 in the interest of Wynn in relation to the Employees. Therefore, the statement that “[A]ll Defendants
 13 are ‘employers’ . . . ,” is a legal conclusion and does not state a claim upon which relief can be
 14 granted. As stated above, Plaintiffs may be able to plead in an amendment how they believe Waits,
 15 LLC was involved in the management. Accordingly, the accounting claim against Waits, LLC is
 16 dismissed with leave to amend.

17 **G. Injunctive Relief - Claim (vii)**

18 Plaintiffs seek injunctive relief based on information and belief that Defendants will continue
 19 the Tip Distribution Policy in the future. Waits, LLC, while maintaining that it is not management
 20 personnel, contends that because there is an adequate remedy at law, with the contract claim,
 21 injunctive relief is not available.

22 Injunctive relief is extraordinary relief and only available when there is irreparable harm.

23 Department of Conservation and Natural Resources, Div. of Water Resources v. Foley, 121 Nev. 77,
 24 80 (Nev. 2005). Here, there is no irreparable harm. Rather, if Plaintiffs prevail on their contract
 25 claim they will receive the money allegedly owed to them. Any amendment to this claim would be
 26 futile. Accordingly, the injunctive relief claim against Waits, LLC is dismissed with prejudice.

1 **IV. Conclusion**

2 Accordingly, **IT IS HEREBY ORDERED** that Defendant Waits, LLC's Motion to Dismiss
3 (#34) is **GRANTED**;

4 **IT IS FURTHER ORDERED** that Defendant Waits, LLC's Motion to Dismiss claims (ii)
5 and (vii) is **GRANTED with prejudice**;

6 **IT IS FURTHER ORDERED** that Plaintiff is granted leave to file a second amended
7 complaint for claims (i),(ii),(iv),(v), and (vi) within fourteen (14) days.

8 DATED this 14TH day of July 2011.

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Kent J. Dawson
United States District Judge

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